

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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TITO BARRON-AGUILAR,

Petitioner,

v.

KYLE OLSEN, *et al.*,

Respondents.

Case No. 3:17-cv-00548-MMD-CLB

ORDER

Before the Court are Respondents' sealed motion for leave to file exhibit under seal (ECF No. 48 ("Motion to Seal")) and motion for enlargement of time (ECF No. 50) to file a reply in support of Respondents' motion to dismiss (ECF No. 43).

The Motion to Seal addresses Exhibit C (ECF No. 48-1), the Nevada Department of Correction's ("NDOC") COVID-19 Protocol and Statistics report, submitted in support of Respondents' opposition (ECF No. 47) to Petitioner Tito Barron-Aguilar's emergency motion for release (ECF No. 44). Respondents contend that NDOC's report contains confidential information regarding prison procedures and protocols and sensitive medical information, which could potentially be used to compromise safety and security at NDOC facilities.

Having reviewed and considered the matter in accordance with the Ninth Circuit Court of Appeals' directives set forth in *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172 (9th Cir. 2006), and its progeny, the Court finds that a compelling need to protect safety and security at NDOC facilities outweighs the public interest in open access to court records. Respondents have met their burden of establishing compelling reasons for Exhibit C to remain sealed.

The Court further notes, however, that the Motion to Seal was erroneously filed under seal when *the Motion to Seal itself* does not contain any confidential information—

1 only the attached exhibit(s) presents confidential information. If a motion to seal itself
2 contains confidential information, the moving party may file a *redacted* motion to seal on
3 the public docket and an *unredacted* motion under seal with the sealed exhibits. However,
4 this practice is disfavored as litigants should attempt to meet their burden under
5 *Kamakana*, 447 F.3d 1172, without specific references to confidential information. Parties
6 must file confidential information separately under seal as a “Sealed Exhibit(s)” and link
7 the sealed exhibit(s) to the motion to seal.

8 In addition, no certificate of service is attached to the Motion to Seal and thus it is
9 not clear whether Barron-Aguilar’s counsel was served with a copy of the sealed
10 documents. When a filing is submitted under seal, CM/ECF does not generate a notice
11 of electronic filing for purposes of service, even though the document is filed
12 electronically. See LR IA 10-5, LR IC 4-1(c)(4) (requiring service “in paper form” when a
13 document is filed under seal, “even if the document is electronically filed”). The Local
14 Rules required Respondents’ counsel to include with the Motion “either (i) a certificate of
15 service certifying that the sealed document was served on the opposing attorneys or pro
16 se parties, or (ii) an affidavit showing good cause why the document has not been served
17 on the opposing attorneys or pro se parties.” LR IA 10-5(c). Here, counsel did neither,
18 although Respondents’ opposition relies on the sealed report to refute Barron-Aguilar’s
19 arguments. (See ECF No. 47 at 10.) Thus, counsel will be directed to comply with LR IA
20 4-1(c)(4) by December 21, 2020.

21 It is therefore ordered that Respondents’ Motion to Seal (ECF No. 48) is granted.
22 Exhibit C (ECF No. 48-1) is considered properly filed under seal.

23 It is further ordered that Respondents must serve Barron-Aguilar’s counsel with a
24 copy of Respondents’ Motion to Seal (ECF No. 48) and its sealed exhibit in accordance
25 with LR IA 4-1(c)(4) by December 23, 2020.

26 The Clerk of Court is directed to unseal Respondents’ Motion to Seal (ECF No. 48),
27 leaving the attached exhibit (ECF No. 48-1) under seal.

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1 Good cause appearing, it is further ordered that Respondents' motion for
2 enlargement of time (ECF No. 50) is granted. Respondents have until January 14, 2021,
3 to file a reply in support of Respondents' motion to dismiss (ECF No. 43).

4 DATED THIS 16th Day of December 2020.

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7 MIRANDA M. DU
8 CHIEF UNITED STATES DISTRICT JUDGE
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